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State of New Hampshire

OFFICE OF ATTORNEY-GENERAL

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Feb. 10

Mr. Kenneth L. Cowan, Director
Division of Inheritance Taxes
State House Annex

Dear Sir:

I have examined the case of State v. Haley, 94 N. H. 69, in connection with a consideration of the case with which you are now concerned in Rockingham County.

As I recall the case in question, the sole legatee has entered a claim against the estate for board and care of the deceased; this claim is co-extensive with the assets of the estate. It is now wondered whether allowance of the claim by the Probate Court will defeat the claim of the State for a tax upon the assets of the estate. My examination of the case cited indicates that it will not.

State against Haley did not undertake to consider the taxability of a claim established in quasi contract on the part of a legatee or heir-at-law; in fact the contention urged by the State therein was that the transaction amounted to a "bargain" made in contemplation of death and R. L. c. 87, s. 38 was considered merely in an attempt to throw light upon the legislative intent. But the case did not turn upon that section.

It would appear to me that R. L. c. 87, s. 38 was designed particularly for the type of case with which you are now concerned and that the fairly gratuitous first sentence in the next to the last paragraph of the opinion was not designed to negative the express terms of the section.

Nor do I see how allowance of the claim by the Court will endanger the position of the State in this case; the allowance of any expense or cost incidental to administration does not necessarily result in an exemption for tax purposes to that extent.

Very truly yours,

Warren E. Waters
Asistant Attorney General

WEW:RM

while acting within the scope of their employment as caretakers may obtain relief under the provisions of the Federal Tort Claims Act (28 U S C A, s. 1291 et seq.) Each of these courts — the United States Court of Appeals for the 10th Circuit in U. S. v. Holly, 192 F 2d 221, and the United States Court of Appeals for the 5th Circuit in U. S. v. Elmo 197 F 2d 230 — after reviewing the details of employment much as set forth in your letter, concluded that caretakers are employees of the United States, and not of the State in connection with those National Guard they may be serving. While, as noted above, the Courts were considering the question to determine the applicability of the Federal Tort Claims Act, the language used and conclusion reached clearly indicates that such personnel are to be held federal employees for all purposes.

While the Court opinions to which reference has been made are, in our view, determinative of the matter, it may be useful to note that the State, for its part, has never considered the personnel in question to be state employees. No attempt has been made — nor could an attempt successfully be made — to include them within the operation of the comprehensive personnel act enacted in 1950; yet that act covers "all positions in state service", with certain exceptions here not pertinent (R. I. c. 27-3 as inserted by Laws 1950, c. 9.) Finally, at this point reference may be made to the fact that membership in the Retirement System - regardless of whether the other attributes of state employment attach in a given case — is predicated upon payment through the office of the State Treasurer.

It is true that certain of the state departments are supported in part by federal funds, and that employees in such departments are eligible for membership in the State Employees Retirement System. Examination of the statute under the authority of which federal funds are supplied will indicate that the sums are made available to the State by the national government to be spent by the state for the purposes and upon the conditions prescribed by federal authorities. In the implementation of a proper purpose, the State may employ personnel; a condition usually imposed is that the personnel shall be employed through a merit system. Failure to pursue the purpose for which the money is allotted, or to observe the conditions under which it may be spent, may result in the stoppage of federal funds.

But the important fact is that the money is paid over to the State, — and not to individual employees.

One state department is supported entirely in its administrative functions by federal funds, the Unemployment Compensation Division. See Cit. 42 U S C A ss. 501, 502; even in this case, however, the federal funds are in "payment to each state" (42 U S C A s. 502).

Apparently in recognition that the administration of Unemployment Compensation is totally a federal concern, to be paid for in all its aspects out of federal monies (Steamed Machine Co. v. Davis, 301 U S 548), the legislature in enacting R. I. c. 27-[illegible] made provision whereby federal